No. 95-1164

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

M.J. "MIKE" FOSTER, JR., in his official capacity as Governor of the State of Louisiana, RICHARD P. IEYOUB, in his official capacity as Attorney General of the State of Louisiana, and BOBBY P. JINDAL, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals,

Petitioners,

—v.—

HOPE MEDICAL GROUP FOR WOMEN, on behalf of itself and the Medicaid-eligible women of the State of Louisiana to whom it provides health care, IFEANYI CHARLES OKPALOBI, M.D., on behalf of himself and his Medicaid-eligible patients seeking abortions, and ZORA H. (a pseudonym), on behalf of herself,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether, as the seven federal courts of appeal to reach this issue have uniformly held, states that participate in the federal Medicaid program must cover all medically necessary abortions for Medicaid-eligible women for which federal funding is not proscribed.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED 5

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION 8

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court 8

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision 12

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: **Page**

Allen v. Mansour, 681 F. Supp. 1232 (E.D. Mich. 1986), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. 1991) 9

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 13

Coe v. Hooker, 406 F. Supp. 1072 (D.N.H. 1976) 10

Dodge v. Department of Social Services, 657 P.2d 969 (Colo. Ct. App. 1982) 10

Doe v. Busbee, 481 F. Supp. 46 (N.D. Ga. 1979) 10

Edwards v. Hope Medical Group for Women, 115 S. Ct. 1 (Scalia, Circuit Justice 1994) 7

Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170 (3d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3501 (U.S. Jan. 22, 1996) (No. 95-820) 5

Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977) 5, 10

Fargo Women's Health Org. Inc. v. Wessman, No. A3-94-36 (D. N.D. Mar. 15, 1995), *summarily aff'd*, No. 95-1920NDF (8th Cir. Feb. 1, 1996) 6

Harris v. McRae, 448 U.S. 297 (1980) 8, 11, 12

Hern v. Beye, 57 F.3d 906 (10th Cir.), *cert. denied*, 116 S. Ct. 569 (1995) 5-6, 7

Hodgson v. Board of County Comm'rs, County of Hennepin, 614 F.2d 601 (8th Cir. 1980) 6, 10

Hope v. Childers, No. 3:95CV-518-S (W.D. Ky. July 28, 1995) 6

Jeannette R. v. Ellery, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) 6

Little Rock Family Planning Services, P.A. v. Dalton, 60 F.3d 497 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (U.S. Jan. 16, 1996) (No. 95-766) 8

National Railroad Passenger Corp. v. Boston & Maine Corp., 530 U.S. 407 (1992) 13

Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980) 9

Planned Parenthood Affiliates of Michigan v. Engler, 860 F. Supp. 406 (W.D. Mich. 1994), *aff'd in relevant part*, 73 F.3d 634 (6th Cir. 1996) 5

Planned Parenthood of Missoula Inc. v. Blouke, 858 F. Supp. 137 (D. Mont. 1994) 6

Planned Parenthood v. Wright, No. 94 C 6886, 1994 WL 750638 (N.D. Ill. Dec. 6, 1994) 6

Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) 6, 7

Reproductive Health Services v. Freeman, 614 F.2d 585 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980) 6

Roe v. Casey, 623 F.2d 829 (3d Cir. 1980) 6

Stangler v. Shalala, No. 94-4221-CV-C-5 (W.D. Mo. Dec. 28, 1994) 6

Utah Women's Clinic, Inc. v. Graham, 892 F. Supp. 1379 (D. Utah 1995) 6

Van Lare v. Hurley, 421 U.S. 338 (1975) 13

Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) 9

Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) 8

Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) 6, 7

Constitutional Provisions, Statutes, and Regulations:

United States Constitution, Article VI, clause 2 . . . . . 1, 13

42 U.S.C. §§ 1396-1396u (1994) 8

42 U.S.C. § 1396a(a)(10)(A) (1994) 8-9

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) 9

42 U.S.C. § 1396d(a) (1994) 9

Pub. L. No. 96-369, § 101(c), 94 Stat. 1352 (1980) 11

Pub. L. No. 96-536, § 109, 94 Stat. 3166 (1980) 11

Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14 (1981) 11

Pub. L. No. 97-377, § 204, 96 Stat. 1830 (1982) 11

Pub. L. No. 103-112, § 509, 107 Stat. 1082 (1993) 2

Pub. L. No. 103-333, § 509, 108 Stat. 2539 (1994) 1, 2

La. Rev. Stat. § 40:1299.34.5 2

Other:

Sup. Ct. R. 10(a) 4

Sup. Ct. R. 10.1(c) 4

Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 11

David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 11

Respondents Hope Medical Group for Women, *et al.* submit this brief in opposition to the petition for a writ of certiorari filed by petitioners the Governor of Louisiana, the Attorney General of Louisiana, and the Secretary of the Louisiana Department of Health and Hospitals, docketed by this Court on January 22, 1996.[1]

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994), provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

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[1]Citations to the Appendix to the Petition for Certiorari are in the form "__a"; citations to the Petition are in the form "Pet. __"; citations to the Appendix to this Brief are in the form "A-__."

COUNTERSTATEMENT OF THE CASE

On October 21, 1993, President Clinton signed into law the fiscal year 1994 appropriations bill for the Departments of Labor, Health and Human Services and Education, which includes the 1994 version of the "Hyde Amendment," an annual rider prohibiting federal reimbursement for abortions except in a narrow range of circumstances. *See* Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993). The 1994 Hyde Amendment, which appropriated federal funds for abortions necessary to save the life of the pregnant woman or when the pregnancy resulted from an act of rape or incest, marked a significant expansion in federal funding for abortion services. Between 1981 and 1993, the annual Hyde Amendment appropriated federal Medicaid funds for abortion services only when the pregnant woman's life was at risk. Despite vigorous attempts in Congress to amend it,[2] the 1995 Hyde Amendment is identical to the 1994 Hyde Amendment. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

This case was commenced on April 6, 1994, seeking declaratory and injunctive relief barring enforcement of La. Rev. Stat. § 40:1299.34.5 ("the funding ban"), for so long as Louisiana receives federal Medicaid funding. The challenged provisions would deny Louisiana Medicaid recipients coverage for abortions "except when the abortion is medically necessary to prevent the death of the mother." *See* 40a. Respondents claimed that, pursuant to the Supremacy Clause of the United States Constitution, the challenged provisions must be enjoined because they directly conflict with federal law which, as of the outset of the 1994 federal fiscal year, mandates Medicaid coverage for abortions for rape and incest victims.

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[2]*See* note 6, *infra*.

On July 28, 1994, the district court entered a permanent injunction against enforcement of the funding ban for so long as Louisiana accepts federal Medicaid funds, holding that the funding ban contravened the Supremacy Clause of the Constitution because it conflicts with federal law, which -- as of October 1, 1993 -- requires state Medicaid programs to pay for abortions for pregnant rape and incest victims, as well as women whose lives are threatened by the pregnancy.

Shortly after the district court's judgment was issued, petitioners sought a stay of the judgment pending appeal. The district court granted only a limited stay of its judgment designed to enable the Louisiana legislature to adopt new legislation to comply with the court's injunction.

On August 1, 1994, petitioners filed a Notice of Appeal of the district court's judgment. The Court of Appeals denied petitioners' request for a stay pending appeal, *see* Pet. 6, as did Justice Scalia in his capacity as Circuit Justice for the Fifth Circuit. *See* 36a-37a.

On September 11, 1995, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the district court's decision in all respects. Louisiana's petition for rehearing was denied on October 17, 1995. *See* 39a.

REASONS FOR DENYING THE WRIT

Petitioners' request for a writ of certiorari must be denied because they have failed to establish any of the factors that weigh in favor of granting the petition. Petitioners claim that the decision of the court of appeals is "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), but review of this portion of their argument discloses that they present no conflict that would alter the outcome of this case. Indeed, the result reached by the court below -- that

States participating in Medicaid must provide coverage for those medically necessary abortions for which federal funding is not proscribed -- is in complete harmony with the decisions of the United States courts of appeals for the First, Third, Sixth, Seventh, Eighth and Tenth Circuits, as well as four recent decisions of United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. Thus, their claimed "conflict" asks this Court to render an advisory opinion. On this issue, which has been litigated extensively in the federal courts over the last fifteen years, there is no standing contrary precedent.

Petitioners argue that the petition should be granted because the court below "decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). Pet. 10. Petitioners claim that this Court must decide "the proper interpretation and construction of the underlying statutory obligations of the States under Title XIX of the Social Security Act to fund, as a particular mandatory item or service, the performance of abortions other than to save the life of the mother." Pet. 12. They suggest that, in the course of doing so, other "related difficulties" "subsumed" within this issue, "such as ascertaining the true meaning of what is 'medically necessary' within the context of the entirety of the complex Social Security Act," *id.*, should or would be decided. But there is no important federal question present in this imagined thicket, because the federal courts have uniformly held that medically necessary abortions are a mandatory covered service under Title XIX; the language of Title XIX itself fully supports this conclusion; and the federal agency responsible for administering the Medicaid program has

construed the statute in this way.[3] There is no need for this Court to use its limited resources to answer a question which is a matter of settled law. The petition should therefore be denied.

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED.

The lower court's decision is in complete accord with every standing decision of the federal appellate and district courts to decide this question, all of which have held that participating state medical assistance programs must cover abortions for rape and incest victims for so long as federal funding is not proscribed for such procedures. *See Planned Parenthood Affiliates of Michigan v. Engler*, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *aff'd in relevant part*, 73 F.3d 634 (6th Cir. 1996); *Little Rock Family Planning Servs., P.A. v. Dalton*, 60 F.3d 497 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (U.S. Jan. 16, 1996) (No. 95-766); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 174 (3d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3501 (U.S. Jan. 22, 1996) (No. 95-820);[4] *Hern v. Beye*, 57 F.3d 906 (10th

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[3]Indeed, Louisiana, in a federal court action over fifteen years ago, conceded that medically necessary abortions are mandatory services under Title XIX. *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX).

[4]In their petition for certiorari, the petitioners in *Blackwell* did not contest "that States are required to fund those abortions for which federal reimbursement is available under the Hyde Amendment." Petition for Certiorari at 10, *Elizabeth Blackwell Health Ctr. for Women*

(continued...)

Cir.), *cert. denied*, 116 S. Ct. 569 (1995); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Services v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Fargo Women's Health Org. Inc. v. Wessman*, No. A3-94-36, slip op. at 25 (D.N.D. Mar. 15, 1995), *summarily aff'd*, No. 95-1920NDF (8th Cir. Feb. 1, 1996); *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, slip op. at 11 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 28, 1995) (order granting preliminary injunction); *Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (annexed as an Appendix to the district court's opinion in *Little Rock Family Planning Services, P.A. v. Dalton*, 860 F. Supp. 609, 628 (E.D. Ark. 1994)) (state court preliminary injunction prohibiting Montana from denying Medicaid coverage for abortions for rape and incest victims).

In four of these cases -- *Little Rock Family Planning Servs., P.A. v. Dalton*, 60 F.3d 497 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (U.S. Jan. 16, 1996) (No. 95-766); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert.*

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[4](...continued)
v. Knoll, 61 F.3d 170 (3d Cir. 1995) (No. 95-820); *id.* at 10 n.6 (noting that petitioners do not raise this issue).

denied, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) -- this Court denied petitions for certiorari. Indeed, in denying an application for a stay pending appeal in this case, Justice Scalia recognized that:

> [t]he Courts of Appeals to address th[e] question [of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment] have uniformly supported that premise . . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless and until a conflict in the Circuits appears.

Edwards v. Hope Medical Group for Women, 115 S. Ct. 1, 2 (Scalia, Circuit Justice 1994), 115 S. Ct. at 2 (citations omitted). No conflicts in the Circuits having appeared, this Court should follow Justice Scalia's well-grounded reasoning and deny this petition.[5]

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[5]The only "conflict" pointed out by petitioners is a difference in the *reasoning* between the court of appeals below and the Court of Appeals for the Eighth Circuit. But a difference in reasoning does not amount to a conflict in the circuits unless the difference results in a different outcome. As shown herein, the lower court's decision is legally correct regardless of whether the Hyde Amendment substantively amends Title XIX. Thus, petitioners ask this Court to render an advisory opinion, which this Court must not do. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968).

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION.

Not only have the lower federal courts been uniform in their treatment of the question presented for review, the result they have reached is supported by the structure of the federal Medicaid Act, this Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980), and the guidance of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services ("HHS"), which is charged with overseeing the federal Medicaid program.

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court.

The federal Medicaid program (established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994)) is a federal-state cooperative program that enables participating states, with the aid of federal funds, to provide medical services to needy individuals. "Although participation in [Medicaid] is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990).

Under Title XIX, certain categories of medical care are "mandatory," and must be provided by every state Medicaid program. *See* 42 U.S.C. § 1396a(a)(10)(A) ("A State plan

for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of section 1396d(a) of this title."). The mandatory categories of care include:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

42 U.S.C. §§ 1396d(a)(1)-(5). A state plan must cover medical services that fall within the mandatory categories of care which an individual's physician certifies as "medically necessary." *See Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (Medicaid must cover medically necessary AZT treatments); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (Medicaid must cover medically necessary sex reassignment surgery); *Allen v. Mansour*, 681 F. Supp. 1232, 1237-38 (E.D. Mich. 1986) (Medicaid must cover medically necessary liver transplant surgery), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. Mar. 19, 1991).

Because abortion falls within several of the categories of mandatory covered services identified in 42 U.S.C. § 1396d(a) -- "family planning services," "physicians' services," "outpatient hospital services," "inpatient hospital services" -- between 1973 and 1976, state Medicaid programs were required to cover medically necessary abortions. As the Court of Appeals for the Eighth Circuit held in *Hodgson*, "[w]e think it plain that [Medicaid's

mandatory services] include medical procedures to induce abortions." 614 F.2d at 607. *See also Doe v. Busbee*, 481 F. Supp. 46, 49 (N.D. Ga. 1979) ("[a]bortion is a medical service which falls within one or more of the five categories of medical service which must, as a minimum, be provided under a state's plan for medical assistance"); *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83, 1086 (D.N.H. 1976) (medically necessary abortions are a covered service under Medicaid); *Dodge v. Department of Social Services*, 657 P.2d 969, 974 (Colo. Ct. App. 1982) ("abortion is a medical procedure . . . . When performed by physicians, this medical procedure necessarily involves physician services. It may also involve inpatient or outpatient hospital services, or both, as well as other statutorily defined categories of authorized medical services in some circumstances").

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Each year since 1976, Congress has added a "Hyde Amendment" to annual appropriations bills for the Department of Health and Human Services. The circumstances in which federal funds have been appropriated for low-income women's abortions have varied. Between fiscal years 1982 and 1993, the Hyde Amendment limited federal funding for abortions to situations where the life of the pregnant woman would be threatened by carrying the pregnancy to term.[6]

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[6]For several years the Hyde Amendment contained a proviso explicitly giving state Medicaid programs the option not to cover even those abortions for which federal funding was available. The provision stated:

(continued...)

In 1980, in *Harris v. McRae*, this Court upheld, against statutory and constitutional challenge, congressional restrictions on federal funding of abortion services for the poor. *McRae* directly supports the result reached by the lower court here. In challenging the Hyde Amendment, the plaintiffs in *McRae* argued that despite the withdrawal of federal funds for non-lifesaving abortions, state Medicaid programs continued to be obligated under Title XIX to cover all medically necessary abortions, even if they had to pay for the procedures entirely with state funds. *See McRae*, 448 U.S. at 307-08 ("[i]t is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its Medicaid plan"). This Court rejected that argument, holding that Congress "did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan." *Id.* at 309. It stated: "Title XIX does not require a participating State to pay for *those*

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[6](...continued)
"Provided, however, That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352, 1353 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980); Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14, 95-96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982). This "state-option" proviso to the Hyde Amendment has not been enacted since 1982, although it was proposed and rejected in 1995. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill).

medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Id.* at 311 (emphasis added).

The plain implication of this Court's holding in *McRae* is that Title XIX requires states to cover those medically necessary abortions for which the funding obligation is not "unilateral," 448 U.S. at 309, and for which federal reimbursement *is* available under the Hyde Amendment. In other words, to the extent that federal funding for medically necessary abortions is not proscribed by the Hyde Amendment, participating states are obligated to continue covering medically necessary abortions, as they did before the Hyde Amendment was enacted.

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision.

Concurring with this analysis, on December 28, 1993, the director of the Medicaid Bureau of HCFA advised state Medicaid directors that, effective October 1, 1993, all state medical assistance plans must cover abortions for which federal funds are appropriated under the current Hyde Amendment (the "HCFA Directive"). *See* A-1-3. In relevant part, the HCFA Directive provides:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided . . . . [W]e believe that this change in the text of the

> Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

A-2. HCFA's interpretation of participating states' obligations under the Hyde Amendment and Title XIX is entitled to substantial deference by this Court. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable agency determination must be accorded "considerable weight").

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined.

The Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338, 346-47 (1975) (New York regulations reducing shelter allowance to AFDC recipients are invalid because they conflict with Title XIX and federal regulations). Because Title XIX and the 1994 and 1995 Hyde Amendments, when read together, mandate coverage of abortions for low-income rape and incest victims -- which the challenged provisions prohibit -- the Supremacy Clause requires invalidation of the challenged provisions; this is precisely what the lower court here held.

CONCLUSION

The lower court's ruling is in harmony with every standing federal decision on this issue and is supported by this Court's prior related decision in *Harris v. McRae*, as well as by the federal Medicaid Act and the HCFA Directive. For the reasons stated herein, the petition for a writ of certiorari should be denied.

Dated: February 20, 1996.

Respectfully submitted,

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